KUMPULAN KAMUNING SDN. BHD.

v.

RAJOO THANGAVELOO & ORS.

FEDERAL COURT, KUALA LUMPUR
ABDUL HAMID OMAR FJ
MOHD. AZMI FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 145 OF 1982]
6 OCTOBER 1983

LABOUR LAW: *Employment - Change of ownership of rubber estate - Termination benefits - Whether payable.*

The appeal was from the order of the Judicial Commissioner dismissing the appellant's application to set aside the order made by the Assistant Director of Labour Sungei Petani. The appellant was ordered to pay termination benefits under reg. 8 of the Employment (Termination and Lay-off Benefits) Regulations 1980 ("the 1980 Regulations"). The respondents were rubber estate workers employed by the Bukit Lembu Division of the appellant company. All of them were "employees" within the meaning of s. 2(1), Employment Act 1955 (revised 1981). There was a change of ownership of the Bukit Lembu Division as a result of a sale to the National Land Finance Co-operative Society Ltd. ("NLF"). The respondents had been made an offer of continuity of service by letter by NLF two months before the sale but had rejected it. Later, the respondents took up employment with NLF as new employees. They brought a joint claim under s. 72 of the Employment Act 1955, for payment of termination benefits. The appellant resisted the claim on the ground that the respondents had acted unreasonably.

Held:

[1] The appellant was jointly and severally liable with NLF to pay the respondents all termination benefits payable under the 1980 Regulations. The obligation to pay was a statutory one and the appellant had no power to impose any conditions before making the payment. There was nothing in the provisions of the 1980 Regulations to indicate that it was the intention of legislature to disentitle employees from termination benefits payable under reg. 8 (before its amendment by PU (A) 174/83) if they unreasonably refused to accept an offer of continued service. It was evident from the clear words used that a distinction is intended by legislature between termination of service due to change of ownership, as provided by reg. 8, and termination for any other cause as provided by reg. 4. As the words used in reg. 8 are plain and unambiguous, the strict and literal approach of interpretation should be adopted. The unreasonable element found in reg. 4 cannot be read into reg. 8. Further, though whenever the strict interpretation of a statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it, there is, however, nothing absurd or unjust in the provisions of reg. 8. *(Nothman v. Barnet Council* [1978] 1 WLR 220; *Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142).

[2] In the absence of any evidence of the actual date of the change of ownership, it was impossible to conclude that a proper notice under reg. 8 (1)(a) had been given. Therefore, the question of the respondents not accepting the offer under reg. 8(1)(b) did not arise.

[Appeal dismissed.]

Cases referred to:
Nothman v. Barnet Council [1978] 1 WLR 220
Artemiou v. Procopiou [1966] 1 QB 878
Reg v. National Insurance Commissioner, Ex parte Hudson [1972] AC 944
Luke v. Inland Revenue Commissioners [1963] AC 557
Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd. [1971] AC 850
Duport Steels Ltd. v. Sirs [1980] 1 WLR 142

Legislation referred to:
Employment Act 1955 (Revised 1981), ss. 2(1), 60J(1)(a), 72, 102
Employment (Termination and Lay-off Benefits) Regulations 1980, regs. 3, 4, (1), (3), (3)(b), 6, 8, (1), (2), (3), (1)(a), (b)
Landlord and Tenant Act 1954 [UK], s. 30

For the appellant - V.T. Nathan (W. Abraham with him); M/s. Shearn Delamore & Co.
For the respondents - B. Lobo; M/s. Lobo Associates

JUDGMENT

Mohd. Azmi FJ:

This is an appeal from an order of the learned Judicial Commissioner at Alor Star dated 23 May 1982 dismissing the appellant's origination motion to set aside the order made by Mr. Cheah Yew Seng, the Assistant Director of Labour Sungei Petani in Labour Case No. 10/1981, wherein the appellant was ordered to pay RM445,917.34 to the respondents as termination benefits under reg. 8 of the Employment (Termination and Lay-off Benefits) Regulations 1980 - PU (A) 278/80 ("the 1980 Regulations" for short).

The respondents were rubber estate workers employed by Bukit Lembu Division of the appellant company which was referred to in the proceedings as KMS Estate. The other part of the appellant's rubber estate was known as the Railway Division with which the present appeal is not concerned. All the respondents were "employees" within the meaning of s. 2(1) Employment Act 1955 (revised 1981), and when there was a change of ownership of Bukit Lembu Division by virtue of a sale by the appellant to the National Land Finance Co-operative Society Ltd. (hereinafter referred to as "NLF"), the respondents made a joint claim under s. 72 of the Employment Act to the Labour Office, Sungei Petani for payment of termination benefits totalling RM445,917.34 which they alleged was payable by the appellant by virtue of the termination of their services under reg. 8. The appellant resisted the claim on the ground that by refusing the offer for continued service on same terms and conditions by NLF (the new owner), the respondents had acted unreasonably in that they purposely kept themselves out of work for two months in February and March 1981, though they continued to live in the estate quarters throughout, and thereafter on 2 April 1981 they took up employment with NLF as new employees. As such they had manoeuvred themselves into a position whereby they rejected continuity of service in

preference to termination of service for the sole purpose of claiming termination benefits - a result which the appellant alleged was never intended by the legislature. Regulation 8 reads as follows:

> 8. (1) Where a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of a part of such business, the contract of service of the employee shall be deemed to have been terminated unless -
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> (a) within seven days of the change of ownership, the person by whom the business is taken over immediately after the change occurs, offers to renew the contract of service of the employee or to continue to employ the employee under the terms and conditions of employment which are not less favourable than those under which the employee was employed before the change occurs; and
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> (b) the employee accepts such offer.
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> (2) Where the contract of service of the employee is deemed to be terminated under para. (1), the person by whom the employee was employed immediately before the change in ownership occurs and the person by whom the business is taken over immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations.
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> (3) Where an offer by the person by whom the business is taken over immediately after the change occurs to continue to employ the employee is accepted by such employee the period of employment of the employee under the period of employment of the employee under the person by whom the employee was employed immediately before the change occurs, shall, for the purposes of these Regulations, be deemed to be a period of employment under the person by whom the business is taken over, and the change of employer shall not constitute a break in the continuity of the period of his employment.

From the Statement of Agreed Facts submitted by Counsel for both parties, it is common ground that on or before 1 February 1981, the respondents were all employees of Bukit Lembu Division of KMS Estate. There was a Sale and Purchase Agreement executed between Messrs Sin Yik Development Sdn. Bhd. and the appellant for the sale of the Railway and Bukit Lembu Divisions. However, the sale in respect of Bukit Lembu Division was not preceded with, and Bukit Lembu Division was then sold to NLF and that Division of the estate was handed over to NLF on 1 February 1981 by the appellant. Before the handing over, the appellant had on 1 December 1980 sent out letters of termination of employment to the respondents together with a letter of offer of continued employment issued by NLF beginning on 1 February 1981 (see Exhibit C4 and C4A). It is common ground that the respondents did not accept the offer of continued employment and on 31 December 1980 they wrote to the appellant acknowledging receipt of the notice of termination of services and requesting termination benefits under reg. 8 (see Exhibit C5). By letter dated 2 February 1981 (Exhibit C6), the appellant agreed to pay termination benefits on the following conditions:- (a) that the respondents reject the offer of employment; (b) that the respondents vacate the labour lines that they were staying in and leaving the estate before 7 February 1981, and (c) that the respondents would refund to the appellant any payment of termination benefits, should they return to work on the

estate. The respondents refused to accept these terms. It is also common ground that the respondents did stop work at the estate for two months from 1 February till 1 April 1981. They however took up employment with NLF as new employees from 2 April 1981, and NLF told them that they were being employed as new employees.

In his grounds of judgment, the learned Judicial Commissioner while recognising some unfairness of the part on the respondents in accepting employment with NLF in April after rejecting NLF's offer for continued service two months earlier, had adopted the strict and literal interpretation of reg. 8, and held that where the language of the legislature was clear the Courts could not inject into the law what was not there however unfair it might be. From the line of argument before the learned Judicial Commissioner and also from the grounds advanced in the petition of appeal, we find no reason to disturb the trial Court's conclusion on the interpretation of reg. 8. It is true that in *Nothman v. Barnet Council* [1978] 1 WLR 220 Lord Denning had said that:

> It is no longer necessary for the Judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the Judges can and should use their good sense to remedy it - by reading words in, if necessary so as to do what Parliament would have done, had they had the situation in mind.

We have considered the entire provisions in the 1980 Regulations and we find nothing to indicate that it is the intention of the legislature to disentitle employees from termination benefits payable under reg. 8 if they unreasonably refused to accept an offer of continued service. Regulation 3 provides the liability of employers to pay termination or lay-off benefits to be calculated in accordance with reg. 6. Regulation 4(1) provides that an employee shall be entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever except under three instances which are not applicable in the present dispute. Paragraphs (2), (3) and (4) of that regulation also spell out the circumstances under which an employee shall not be entitled to any termination benefits. In particular, reg. 4(3)(b) provides that an employee shall not be entitled to such benefits if the employer has offered to renew his contract of service or to re-engage him under a new contract and the employee has unreasonably refused that offer. This 'unreasonableness' element has clearly been omitted by the legislature in reg. 8 where the payment of termination benefits is payable by virtue of change of ownership of the employer's business. Regulation 8(1) provides that the contract of service of the employee shall be deemed to have been terminated unless: (a) within 7 days of the change of ownership the new owner offers to renew the contract of service of the employee or to continue to employ the employee under the terms and conditions of employment which are not less favourable than those under the outgoing owner; and (b) the employee accepts such offer. Regulation 8(2) goes on to say that where the contract of service of the employee is deemed to be terminated under para. (1), both the new and outgoing owners shall be jointly and severally liable for the payment of all termination benefits payable under the Regulations. Further, reg. 8(3) expressly provides that where an offer is accepted by such employee, the period of employment under the outgoing owner shall be deemed to be a period of employment under the new owner, and the change of

employer shall not constitute a break in the continuity of the period of his employment. For the purpose of this appeal it is relevant to consider reg. 4(3) as it is worded in similar fashion as reg. 8(1) and relied upon heavily by Counsel for the appellant in his persuasive argument that the purposive approach as opposed to the strict and literal approach should be adopted for the interpretation of reg. 8, and by so doing the 'unreasonableness' element in reg. 4(3)(b) should be read into reg. 8. Regulation 4(3) provides:

> (3) An employee shall not be entitled to any termination benefits payment if, not less than seven days before the date with effect from which his services are to be terminated, the employer has offered to renew his contract of service or to re-engage him under a new contract, so that -
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> (a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not be less favourable than the corresponding provisions of the contract as in force immediately before the termination of his services; and
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> (b) the renewal or re-engagement would take effect on or before the date, with effect from which his services are to be terminated, and the employee has unreasonably refused that offer.

Thus, under para. (3) of reg. 4, an employee shall not be entitled to termination benefits if he has unreasonably refused the offer of the employer to renew his contract of service or to re-engage him under a new contract, whereas the 'unreasonableness' element is totally absent in reg. 8. Another material distinction between the two provisions is that the offer under reg. 4(3) must come from the **same employer** not less than 7 days **before** the date with effect from which his service is to be terminated; whereas under reg. 8 it is the **new owner** who must make the offer within 7 days **of the change** of ownership. Thus, where the termination of service is occasioned by a change of ownership of the employer's business, termination benefits are payable if the new owner failed to make the offer within the prescribed time, and even if he did make the offer, he would still be liable to pay if the employee refused to accept it. Therefore, unless the offer is made and accepted by the employee, the contract of service shall be deemed in law to have been terminated, and when so terminated the liability of the old and new owners of the business to pay termination benefits shall arise jointly and severally without any exception or proviso. On the other hand, where the termination of service is occasioned by any other cause, such benefits are payable by the existing employer unless the case falls within any of the provisos and exceptions provided in reg. 4. From the clear words in the two regulations, it is evident that for the purpose of termination benefits the legislature's intention is to make a distinction between termination of service due to change of ownership and termination for any other cause. Regulation 4 covers a wider area of situations where termination benefits are payable by the employer with a number of exceptions and provisos; whereas reg. 8 is restricted only to a situation where there is a change of ownership, and consistent with the law of contract between master and servant, it does not seem unfair and absurd that the legislature does not intend to penalise an employee for refusing to accept continuity of service from a new employer

in preference to a termination of service, although subsequently he takes up employment with the new owner either on lesser or same or better terms and conditions of service. If an employee decided to accept the offer of the new owner then he would enjoy the benefit of continuous contract of service by virtue of the deeming provision under reg. 8(3), and he would, for example, obtain more attractive retirement benefits or termination benefits due to his longer period of continuous service should he retire or his service with the new employer be terminated for any reason subsequently. Whereas, an employee who refused to accept continued employment though enjoying early financial gain would probably get smaller retirement benefits or termination benefits in the same situation unless in the case of termination benefits he has completed 5 years uninterrupted service with the outgoing employer and is able to accumulate another 5 years continuous service with the new employer. In that instance he has to take considerable risk but he cannot complain of not being given the opportunity for continued employment. The quantum of termination benefits payable under reg. 6 depends on the period of continued contract of service - the longer it is, the bigger will be the quantum. However, the maximum payment is 20 days wages for every year of employment where an employee has been under a continuous contract of service for 5 years or more. In our view there is nothing absurd or unjust in the provisions of reg. 8. As stated earlier, the legislature has purposely omitted the 'unreasonableness' element by giving an employee a complete choice whether to accept or refuse an offer of continued employment when there is a change of ownership in the business of the employer. We therefore agree with both the Assistant Director of Labour and the learned Judicial Commissioner that on a proper construction of reg. 8, the respondents had absolute choice whether to accept or refuse the offer made by NLF for continued service without assigning any reason. We hold that unlike reg. 4(3), an employee need not show any ground for refusing to accept the offer before he is entitled to termination benefits. Since the respondents had decided not to accept the offer, their services with the appellant "shall be deemed to have been terminated" under reg. 8(1), when the change of ownership occurred, and by virtue of reg. 8(2) the appellant was jointly and severally liable with NLF to pay them all termination benefits payable under the 1980 Regulations. Being a statutory obligation the appellant had no power to impose the conditions in Exhibit C6 before making the payment to the respondents.

Before us learned Counsel for the appellant has extended his argument by inviting us to conclude that even where there is a change of ownership, the case must come under reg. 4. For reasons already stated, we see no reason to agree with that proposition. Without reg. 8, the respondents' contracts of service with the appellant would under the general law of master and servant come to an end, and they would be at the mercy of the new owner. But under reg. 8 they had a choice. They could opt for termination benefits instead of preserving their continuity of service. If their continuity of service was interrupted, it would be due to their own fault and they could not in future be saved by the definition of "continuous contract of service" under reg. 2 which means, "uninterrupted service with an employer, including service which may be interrupted on account of ... a cessation of work which is not due to any fault on the part of the employee".

A number of leading cases on purposive approach in the interpretation of statutes has been referred for our consideration by Counsel for the appellant. In *Artemiou v. Procopiou* [1966] 1 QB 878, in construing the meaning of certain words under s. 30 of the Landlord and Tenant Act, 1954, Danckwerts LJ said:

> An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available. In the present subsection the result contended for would be quite irrelevant to the mischief which the statutory provision was intended to meet, namely, the prevention of exploitation of tenants by speculators.

Similarly in *Reg v. National Insurance Commissioner, Ex parte Hudson* [1972] AC 944, where the words "... decision of any claim ... shall be final" was considered under the National Insurance (Industrial Injuries) Act 1946, Lord Diplock had this to say:

> To find out the meaning of particular provisions in social legislation of this character calls, in the first instance, for a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them. Meticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to this purposive approach. It should not distract your Lordships from it.

Similar principle of promoting the general legislative purpose was approved in *Luke v. Inland Revenue Commissioners* [1963] AC 557; *Nothman v. Barnet Council* (*ante*); *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [1971] AC 850. We must be forgiven for not going into the various authorities in greater detail. In our view they contain well-established principles of construction, but almost all of them are really unnecessary for the determination of this appeal as they did not directly deal with the nature of the present dispute. In the present appeal, it was initially argued on behalf of the appellant that the 'unreasonableness' element in reg. 4(3)(b) should be read into reg. 8, and subsequently before us it is argued that both regulations must be read together in all cases. It must be emphasised that we are not dealing with the meaning of certain words or phrases or particular sentence used by the legislature with which almost all the authorities cited are concerned. The words used in reg. 8 are not ambiguous and their meaning is plain. As such we are of the view that the strict and literal approach should be adopted. It is true that one of the objects of the 1980 Regulations is to preserve continuity of service. But, more importantly the paramount object is to compensate employees by means of termination benefits where their contracts of service are terminated. This is self-evident from the title of the Regulations itself. The 1980 Regulations are made by the Minister under s. 102 of the Employment Act 1955 which gives him general power to make subsidiary legislation although it can safely be assumed that what he had in mind must be s. 60J(1)(a) which specifically confers him with the power to provide by regulations for the entitlement of employees to and for the payment by employers of termination benefits. Regulation 4 is of general application to cover cases of termination for whatever reason. Separate provision is made to cover termination of service occasioned by change of ownership of the employer's business under reg. 8. Thus, unless the omission of the 'unreasonableness' element in reg. 8 can be shown by the appellant to give rise to an absurd and unjust situation, no Court should read anything more in that regulation. As was held in *Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142:

> Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable.

In the present dispute, it was NLF as purchaser and new owner of the appellant's business who made the offer of continuity of service to the respondents as required by reg. 8(1)(a). It is pertinent to note that NLF never made any complaint when their offer (Exhibit C4A) dated 5 December 1980 was not accepted by the respondents, although NLF is jointly and severally liable with the appellant to pay termination benefits payable under the 1980 Regulations. Indeed NLF went even further by employing the respondents as new employees in April after the respondents had ceased working for the appellant on 1 February 1981.

The fact that reg. 8 has now been amended by PU (A) 174/83 whereby the 'unreasonableness' element has been expressly introduced cannot, of course, affect our conclusion. If at all, it merely supports our view that unlike reg. 4(3) the provision of reg. 8 before amendment was not intended to include the 'unreasonableness' element.

The only remaining point which we need to comment is something which has not been considered either before the Assistant Director of Labour or the Learned Judicial Commissioner. The point refers to the date of change of ownership of Bukit Lembu Division from the appellant to NLF. We are unable to find this date from the appeal records. Mr. W. Abraham, who is assisting the Counsel for the appellant has confirmed to us from the Bar that he has received instruction from his client not to produce the Sale and Purchase Agreement. It is, of course, not for us to know the reason for such instruction, but the only satisfactory way of determining the date of change of ownership would be for the Court to have a look at the agreement. In the absence of any evidence as to the date of change of ownership as opposed to the date of the handing over of the property to NLF, it seems to us that the appellant had failed to prove that it had complied with the requirement of reg. 8 (1)(a). It is abundantly clear from reg. 8(1) that unless conditions (a) and (b) were complied with, the respondents' contracts of service should be deemed to have been terminated and as such they were entitled to termination benefits. There is no evidence that the offer made by NLF by their letter dated 5 December 1980 (Exhibit C4A) was made within the prescribed time i.e. "within 7 days of the change of ownership". Even if we were to adopt the date of handing over (1 February 1981) as the date of change of ownership, the offer must be made within 7 days from that date. The only offer made by NLF is Exhibit C4A dated 5 December 1980 i.e. made nearly two months before the change of ownership. In the absence of any evidence of the actual date of change of ownership, it would be impossible to conclude that Exhibit C4A could constitute a proper notice under reg. 8(1)(a). There being no offer from NLF in accordance with reg. 8(1)(a), the question of the respondents not accepting the offer under reg. 8(1)(b) would and could not arise. In our view on this further ground the payment of the termination benefits to the respondents had been lawfully ordered.

For the above reasons, we dismiss this appeal with costs. We also order that the deposit be paid to the respondents on account of taxed costs.

Also found at [1983] 2 CLJ 242